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No. 05-361

In the Supreme Court of the United States

CORUS STAAL BV AND CORUS STEEL USA, INC.,
PETITIONERS

v.

DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's longstanding, and admittedly reasonable, construction of a domestic antidumping statute, notwithstanding World Trade Organization and North American Free Trade Agreement panel reports interpreting a purportedly analogous provision in an international trade agreement, where Congress has specifically provided that international panel reports have no legal effect with respect to federal law except as implemented by the Executive Branch or Congress.

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In the Supreme Court of the United States

No. 05-364

CORUS STAAL BV AND CORUS STEEL USA, INC.,
PETITIONERS

v.

DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 395 F.3d 1343. The judgment and opinion of the Court of International Trade (Pet. App. 11a, 12a-46a) are reported at 283 F. Supp. 2d 1357.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2005. A petition for rehearing was denied on May 18, 2005 (Pet. App. 61a-62a). On July 28, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 15, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Anti-Dumping Act, 1921, 19 U.S.C. 1673 *et seq.*, and the Tariff Act of 1930, 19 U.S.C. 1001 *et seq.*, have long provided for the imposition of antidumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673.[1] If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

In assessing whether merchandise is being "dumped" in the United States, the Department of Commerce adjusts both the "normal value" and the "export price" to achieve a "fair comparison" between the two. 19 U.S.C. 1677b(a). For example, the statute calls for subtracting transportation costs to the United States, if those are included in the export price, and eliminating the effect of import duties applied by the exporting country on imported parts. 19 U.S.C. 1677a(c), 1677b(a)(6) and (7).[2]

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[1] This language was originally adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which, prior to 1979, was codified at 19 U.S.C. 160 *et seq.* (1976). It was subsequently reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, § 1, 46 Stat. 590, as part of a more general revision of customs laws relating to the General Agreement on Tariffs and Trade. See Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (19 U.S.C. 1673 *et seq.*).

[2] When, as in this case, there is a third-party intermediary, such as a broker or an affiliate of the seller, the statute calls for the Department of Commerce to use a "constructed export price," which entails further

If the Department of Commerce makes a final determination that merchandise is being sold in the United States at less than its fair value, the Department is required to determine an "estimated weighted average dumping margin" for each exporter and producer and an "all-others" rate for those not individually investigated. 19 U.S.C. 1673d(c)(1)(B). Exporters and producers must then post a cash deposit or security for each entry in an amount based on the appropriate dumping margin. *Ibid.*

The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Under the Department of Commerce's long-standing construction of the statute, there is a "dumping margin" only when the normal value at which a product is sold in the exporting country "exceeds the export price" to the United States by a positive value. 19 U.S.C. 1677(35)(A).[3] In other words, if the export price is the same as or higher than the normal value, there is no, or zero, "dumping margin," and thus nothing to include when summing the "dumping margins" that the statute

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adjustment, including the elimination of commissions. 19 U.S.C. 1677a(b) and (d)(1)(A). Because the distinction between "export price" and "constructed export price" is irrelevant to the issues presented here, we will, for the sake of convenience, refer simply to "export price."

[3] Under certain circumstances not relevant here, normal value may be calculated using third country sales, constructed value, or factors of production. 19 U.S.C. 1677b(a)(1)(C), (4) and (c)(3).

specifies as the numerator in the "weighted average dumping margin" ratio. 19 U.S.C. 1677(35)(B).[4]

Once an affirmative dumping determination has been made, the statute provides for an administrative review of the antidumping duty to be conducted on an annual basis, upon request. 19 U.S.C. 1675. The dumping margin that is determined during the course of this review then becomes the basis for estimated antidumping duties that are collected on new entries of merchandise and for the assessment rates for importers. 19 U.S.C. 1675(a)(2)(A) and (C).

2. In 1994, the United States became a signatory to several Executive agreements, known collectively as the Uruguay Round Agreements (the Agreements), one of which is the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Agreement), *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. Vol. 1, at 1453 (1994). Congress enacted the Uruguay Round Agreements Act (URAA), 19 U.S.C. 3501 *et seq.*, to implement those Agreements. 19 U.S.C. 3511. In the URAA, Congress established detailed rules regarding the relationship between the Agreements and domestic law (including domestic trade laws), as well as an elaborate process for dealing with disputes concerning the consistency of domestic laws with the Agreements.

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[4] The denominator of the ratio—the "aggregate export prices" of the exporter's sales—is calculated by summing the export prices of all sales, including those that take place at or above the normal value. 19 U.S.C. 1677(35)(B). The inclusion of sales at and above the normal value in the denominator has the effect of lowering the weighted average dumping margin, and hence the antidumping duty, compared to what it would be if the denominator were derived by summing only the export prices for sales in which dumping occurred.

As a general matter, Congress emphasized the continuing primacy of federal law in the event of any conflict between it and the Agreements. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and federal law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that neither the Uruguay Round Agreements nor the fact of Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging Executive Branch action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Because the URAA specifies that the Agreements create no privately enforceable rights and cannot provide the basis for challenging administrative actions, disputes with respect to the United States' compliance with its obligations under the Agreements can be

brought only through the mechanisms provided in the Agreements themselves. See The Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), 33 I.L.M. 1226 (1994); 19 U.S.C. 3511(d)(16). Those procedures include bringing disputes before a World Trade Organization (WTO) panel, the findings of which can be appealed to the WTO Appellate Body. See Dispute Settlement Understanding, Arts. 6, 17, 33 I.L.M. at 1230, 1236. Private entities may not initiate a proceeding before a WTO panel; rather, only a WTO Member may invoke the WTO dispute settlement procedures. *Id.* Art. 2.1, 33 I.L.M. at 1226.

Congress was very specific, when it enacted the URAA, about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA) approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, *supra*, at 659. Nor may a party ask a court to direct implementation of a WTO Report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

In the URAA, Congress established two methods for implementing certain types of WTO dispute settlement reports. One method deals with the amendment, rescission, or modification of an agency regulation or practice that a WTO report indicates is inconsistent with the Uruguay Round Agreements, including the Antidumping Agreement. Section 3533(g) specifies that

the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures set forward in the subsection have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The United States Trade Representative (USTR) is required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and to provide an opportunity for public comment, before determining whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(E). No implementation may become effective until the relevant congressional committees have been allowed a specified period of time to indicate their agreement or disagreement with the proposed implementation. 19 U.S.C. 3533(g)(2) and (3).

A second procedure for implementing a WTO report in domestic law is set forth in 19 U.S.C. 3538. Section 3538 is narrower in scope than Section 3533(g), and applies, *inter alia*, to the situation in which a WTO dispute settlement report indicates that an action by the Department of Commerce in an antidumping proceeding was not in conformity with the United States' obligations under the Uruguay Round Antidumping Agreement. 19 U.S.C. 3538(b)(1).[5] Like the statutory procedure under

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[5] Section 3538(b)(1) also applies when an action by the Department of Commerce in a countervailing duty proceeding is found to be inconsistent with the Uruguay Round Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement"), *reprinted in* H.R. Doc. No. 316, *supra*, at 1533. Section 3538(a)(1) applies when an action by the United States International Trade Commission is found to be inconsistent with the Antidumping Agreement, the Subsidies Agreement, or the Uruguay Round Agreement on Safeguards, *reprinted in* H.R. Doc. No. 316, *supra*, at 1577.

Section 3533, Section 3538 provides for consultation between USTR and relevant stakeholders before USTR makes a determination whether and how to implement the WTO body report. Section 3538 specifies that "*[b]efore* the administering body implements any determination * * * the Trade Representative shall consult with the administering authority and the congressional committees," 19 U.S.C. 3538(b)(3) (emphasis added), and the administering authority "shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing," 19 U.S.C. 3538(d). Upon completion of this process, USTR "*may* * * * direct the Department of Commerce to implement, in whole or in part," a new determination consistent with the WTO body's findings. 19 U.S.C. 3538(b)(4) (emphasis added).

If USTR requests that the Department of Commerce issue a new determination and orders Commerce to implement it, the new determination applies only to "unliquidated entries of the subject merchandise" that are entered or withdrawn from warehouse for consumption on or after the date the USTR directs the Department of Commerce to implement the new decision. 19 U.S.C. 3538(c)(1).

In the URAA, Congress made clear that the USTR could, after consultation, choose *not* to alter the administrative action that is the subject of an adverse WTO report, and may instead offer the complaining party trade compensation in some other form. 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of new determination consistent with WTO report "in whole or in part"); H.R. Doc. No. 316, *supra*, at 1015; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to imple-*

ment the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation") (emphasis added). Importantly, the political branches could decide not to implement the new determination, but instead to compensate our trading partners in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, *supra*, at 1016.

3. Petitioners are a Dutch corporation, Corus Staal BV, and its wholly-owned American subsidiary, Corus Staal, USA, Inc., which manufacture and export steel products to the United States. In 2001, the Department of Commerce determined that hot-rolled steel from the Netherlands was being sold, or likely to be sold, in the United States at less than fair value. The Department calculated the weighted-average dumping margin by aggregating all model-specific dumping margins, assigning a dumping margin of zero to those comparisons in which the United States price exceeded normal value. *Hot-Rolled Steel Products from China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 66 Fed. Reg. 57,482 (2001), adopting the *Issues and Decision Memorandum for the Antidumping Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Notice of Final Determination of Sales at Less Than Fair Value* (Oct. 3, 2001). The antidumping duty order established a 2.59% weighted average dumping margin with respect to petitioners' exports. *Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 59,565 (2001).

4. Petitioners filed an action in the Court of International Trade challenging the Department's methodology

for calculating the weighted average dumping margin. The court held that the Department had reasonably interpreted the relevant statute, and rejected petitioners' contention that the Department's interpretation was unreasonable because it allegedly conflicted with a report adopted by the WTO Dispute Settlement Body (DSB) interpreting the Antidumping Agreement. After noting that the Department's methodology has been repeatedly sustained by the Court of International Trade and the Federal Circuit, and that WTO panel reports are not binding even within the WTO, the court concluded that a panel report, even if adverse to the United States' interests before the WTO, did not render the Department's statutory interpretation unreasonable. Pet. App. 29a.

5. The Federal Circuit affirmed. Pet. App. 1a-10a. The court held that the Department of Commerce's interpretation of the relevant statute, which the court agreed was ambiguous, was reasonable. *Id.* at 5a-6a. Noting that WTO reports are not binding upon the United States, let alone United States domestic courts, the court of appeals observed that, pursuant to statute, "[n]o provision of any of the Uruguay Round Agreements * * * that is inconsistent with any law of the United States shall have any effect." *Id.* at 8a (quoting 19 U.S.C. 3512(a)). In particular, the court of appeals noted that Congress has established a procedure by which the Executive Branch will, "in consultation with various congressional and executive bodies and agencies, * * * determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation." *Id.* at 9a. The court refused to overturn the Department of Commerce's interpretation of an ambiguous statute "based on any ruling by the

WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." *Id.* at 10a.

ARGUMENT

The court of appeals correctly held that the Department of Commerce's calculation of aggregate dumping margins in the investigation at issue in this case was reasonable. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioners contend (Pet. 2-4, 14-20) that the Court should grant certiorari to determine whether an agency's otherwise reasonable interpretation of a statute, which would normally be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), must be overturned in light of *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), on the ground that the challenged agency practice is allegedly inconsistent with an international body's interpretation of an Executive agreement to which the United States is a party. Petitioners rely (Pet. 3) on this Court's observation in *Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," 6 U.S. (2 Cranch) at 118. According to petitioners, the *Charming Betsy* canon establishes broad judicial authority to compel the Executive Branch to conform its implementation of domestic law to principles of international law. For example, petitioners urge that "the *Charming Betsy* rule necessarily excludes from the range of otherwise reasonable interpretations" those that have been held by an interna-

tional body to violate an international obligation of the United States, even when the agency's interpretation has been upheld repeatedly under *Chevron*. Pet. 22. See Pet. 3 ("where, as here, a Department interpretation [has been held by a WTO body to be] inconsistent with U.S. treaty obligations, the *Charming Besty* doctrine renders that interpretation unreasonable" and no longer entitled to *Chevron* deference).

We note at the outset that neither *Charming Betsy* nor any other decision of this Court applying that precedent stands for the broad principle advocated by petitioners. *Charming Betsy* itself dealt with the question whether a domestic statute prohibiting trade by Americans with France should be construed to apply to an American ship that had been purchased by a citizen of Denmark, a country that was neutral with respect to the hostilities between the United States and France. 6 U.S. (2 Cranch) at 115-116. Thus, the question specifically addressed by the Court was whether the statute adopted by Congress should "be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Id.* at 118.

This Court's subsequent cases applying *Charming Betsy* have likewise involved avoidance of "unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (application of antitrust statute to conduct with adverse foreign effect). See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (application of employment discrimination statute to bases in foreign lands that were the subject of Executive agreements with the host governments); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22

(1963) (application of National Labor Relations Act to foreign-flag vessels); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (application of Jones Act in maritime cases); see generally *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 814-815, 817 (1993) (Scalia, J., dissenting) (describing principle as one of "prescriptive comity," that "Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe").

This case is not a proper vehicle for considering whether the *Charming Betsy* canon should be extended in the manner advocated by petitioners. That canon, whatever its proper scope, has no application when, as here, Congress has unambiguously specified that alleged conflicts between a domestic agency action and the relevant international agreements are to be resolved through consultation between the Executive and Legislative Branches, and not through litigation in domestic courts.

2. Congress has expressly precluded attempts, such as petitioners', to use the courts of the United States to compel the Department of Commerce to act in conformity with the Uruguay Round Agreements. Section 3512(c)(1)(B) specifically provides that "[n]o person * * * may challenge, in any action brought under any provision of law, any action or inaction by any department * * * on the ground that such action or inaction is inconsistent with [one of the Uruguay Round Agreements]." 19 U.S.C. 3512(c)(1)(B). Petitioners' challenge falls squarely into that forbidden category; they claim (Pet. 21) that "the Department's practice of zeroing negative dumping margins in investigations violates the[] requirements" of the Antidumping Agreement, and that "[t]his treaty violation warrants plenary review and reversal of

the decision below." See *id.* at 15 (characterizing the issue presented as "whether the Department's interpretation ran afoul of U.S. treaty obligations").[6]

In apparent recognition that Section 3512(c) bars a challenge based directly upon an alleged inconsistency between the Department's determination and the Antidumping Agreement, petitioners attempt to characterize their arguments as arising out of a "conflict over the proper interpretation of the statutory definition of the fundamental term 'dumping margin' in 19 U.S.C. § 1677(35)(A)." Pet. 14. Tellingly, however, petitioners make no argument that the Department of Commerce's practice is inconsistent with the language of the statute or otherwise inappropriate, apart from their claim that the Department's view is inconsistent with the opinions of various WTO or binational panel reports.[7]

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[6] We note that, contrary to petitioners' characterization, the Uruguay Round Agreements are not "treaties," but, rather, Executive agreements that have been approved by Congress and implemented in federal law through implementing legislation. See generally 19 U.S.C. 2902, 2903, 3511(a), 3512.

[7] The Federal Circuit has previously recognized the reasonableness of the Department of Commerce's construction of the statute, which has been upheld repeatedly over the past twenty years. See *Timken Co.* v. *United States*, 354 F.3d 1334, 1343 (Fed. Cir.), cert. denied, 125 S. Ct. 412 (2004); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996); *Serampore Indus. Pvt. Ltd.* v. *Department of Commerce*, 675 F. Supp. 1354, 1360-1361 (Ct. Int'l Trade 1987). As the Court of International Trade has noted, "[t]he practice of considering negative margins as zero ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." *Serampore*, 675 F. Supp. at 1360. In other words, "profitable sales" are not allowed "to 'mask' sales at less than fair value." *Timken*, 354 F.3d at 1343.

As the court of appeals correctly held, Congress has specified a process for resolving disputes over the United States' compliance with its obligations under the Uruguay Round Agreements, a process that involves international dispute resolution mechanisms and, following the completion of that process, a determination by the political branches of this Nation's government whether and how to implement the international body's findings. Petitioners seek to circumvent that process by invoking the authority of the federal courts in an effort to obtain a remedy that Congress has expressly made unavailable.

As previously noted, see p. 6, *supra*, only a WTO Member, not a private party, may initiate proceedings under the Dispute Settlement Understanding. The European Communities have, in fact, initiated a dispute settlement proceeding before a WTO panel that encompasses, among other things, the Department of Commerce's antidumping determination with respect to petitioners' steel products. That proceeding is still ongoing.

Even assuming that petitioners' view of the Antidumping Agreement's provisions is upheld through the WTO process, the Department of Commerce will not necessarily need to amend the antidumping determination regarding petitioners' products. As the court of appeals correctly observed, the United States need not implement an adverse WTO report. Pet. App. 9a. Congress has specifically provided, and the Dispute Settlement Understanding similarly recognizes, that a WTO Member possesses discretion to decide whether and how to implement a WTO report that finds that the Member acted inconsistently with its WTO obligations. Instead of implementing a WTO report, a Member may choose to offer compensation or other trade concessions to the

Member that brought the WTO proceeding. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; 19 U.S.C. 3538(a)(6) and (b)(4); H.R. Doc. No. 316, *supra*, at 1016.

The decision whether to implement a WTO report "in whole or in part," 19 U.S.C. 3538(b)(4), would be made by USTR after completing the statutorily required process for gathering input from congressional, administrative, and private sector stakeholders, 19 U.S.C. 3538(b)(1)-(3) and (d). Moreover, even assuming that USTR directs the Department of Commerce to issue a new determination consistent with petitioners' understanding of the Antidumping Agreement, Congress has specified that the new determination would have only prospective effect "with respect to unliquidated entries of the subject merchandise * * * that are entered, or withdrawn from the warehouse, for consumption on or after * * * the date on which the Trade Representative directs the [Department] to implement that determination." 19 U.S.C. 3538(c)(1)(B). Thus, petitioners seek relief—recovery of duties already paid (Pet. 18)—that is more generous than the remedy provided by Congress under the applicable statutory framework.

Contrary to petitioners' assertion (Pet. 30), the court of appeals' recognition of the primacy of this statutory scheme does not strip Congress of its "voice" in international commerce. Rather, Congress has spoken clearly and unambiguously by providing that only the political branches shall have the authority to determine whether and how to respond to an adverse WTO report. The statute is also clear that, to the extent that there is a conflict between federal law and the Uruguay Round Agreements, federal law must prevail. Indeed, it is petitioners' approach that, if implemented, would strip Con-

gress and the Executive Branch of the powers that Congress intended the two branches to retain in the international trade arena.

Contrary to petitioners' characterization, the court of appeals did not hold that Sections 3533(g) and 3538 "foreclose judicial review of a claim that the Department has improperly interpreted an ambiguous provision of the Tariff Act." Pet. 28. Rather, the court of appeals considered and rejected on the merits petitioners' arguments that the Department of Commerce had adopted an unreasonable and impermissible interpretation of the statutory requirements to make a "fair comparison * * * between the export price * * * and normal value," Pet. App. 7a n.5 (quoting 19 U.S.C. 1677b(a)) , and to use a "weighted average" in doing so, *id.* at 5a (quoting 19 U.S.C. 1677f-a(d)(1)(A)(i)). To the extent that, in ruling on the merits of petitioners' statutory arguments, the court of appeals refused to give determinative weight to the decisions of WTO bodies construing provisions of the Antidumping Agreement, the court of appeals was simply giving effect to Congress's directives that the decision whether and how to implement a WTO ruling is for the political branches, 19 U.S.C. 3538, and that "[n]o person * * * may challenge, in any action brought under any provision of law, any action or inaction by any department * * * on the ground that such action or inaction is inconsistent with [one of the Uruguay Round Agreements]," 19 U.S.C. 3512(c)(1)(B).

3. The same arguments addressed in the preceding section were previously advanced in an unsuccessful petition for a writ of certiorari seeking review of *Timken Co.* v. *United States*, 354 F.3d 1334 (Fed. Cir.), cert. denied, 125 S. Ct. 412 (2004) (No. 04-87). Petitioners urge that certiorari is appropriate now in light of post-

Timken developments, in particular the development of a purported conflict between the holdings of the Federal Circuit and the recent ruling of a binational panel convened under the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, United States-Canada-Mexico, 32 I.L.M. 289 (entered into force Jan. 1, 1994). See Pet. 16-17 (citing *Certain Softwood Lumber Products from Canada* (*Softwood Lumber*), Secretarial File No. USA-CDA-2002-1904-02 (June 9, 2005)).

Petitioners' reliance on a NAFTA arbitral decision is misplaced. Congress has made the option of binational panels available only with respect to imports covered by NAFTA, *i.e.*, merchandise from Canada or Mexico. See 19 U.S.C. 1516a(g), 3434(c).[8] In particular, challenges like that raised by petitioners in this case, whose products are imported from the Netherlands, are not subject to the NAFTA arbitration process. Thus, petitioners' claim of a "conflict" is based on a decision in an arbitration process to which they are not entitled.

Moreover, petitioners' alleged "conflict" is illusory. Pursuant to the terms of NAFTA, decisions of NAFTA panels are binding *only* with respect to the particular matter between the parties and before the NAFTA panel, and have no precedential effect. NAFTA, Art.

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[8] In a proceeding involving merchandise from Canada or Mexico, a party wishing to challenge either the Department of Commerce's initial determination or the results of an administrative review may do so in one of two ways. First, it may obtain review in the United States Court of International Trade. 19 U.S.C. 1516a(a)(1). Second, at the request of either party, review of the Department's determination may be had before a binational panel convened pursuant to Chapter 19 of NAFTA. 19 U.S.C. 1516a(g)(2). If a binational panel is requested, its authority is exclusive, with certain exceptions not relevant here. 19 U.S.C. 1516a(g)(2)-(4).

1904(9), 32 I.L.M. at 683. Congress has made clear that "a court of the United States is not bound by but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA." 19 U.S.C. 1516a(b)(3). As the legislative history emphasizes, "[t]he intent of this provision is to make clear that a panel or committee decision is binding only with respect to the particular matter before that panel and does not constitute binding precedent on U.S. courts *or other binational panels*." North American Free Trade Agreement Implementation Act, H.R. Rep. No. 361, 103d Cong., 2d Sess., Pt. 1, at 83 (1993) (emphasis added). See H.R. Doc. No. 316, *supra*, at 926 (noting, in connection with adoption of the URAA, that a United States-Canada binational "panel decision would not be binding precedent in future cases"). Therefore, the NAFTA panel decision in *Softwood Lumber* can have no effect upon this case, which involves different parties, a different product, and a different investigation.

In addition, NAFTA panel decisions cannot create any "conflict" with the Federal Circuit because NAFTA panels are subject to Federal Circuit precedent. A NAFTA panel functions as a trial court, "replace[ing]" the Court of International Trade for purposes of reviewing the antidumping duty, and is required to apply "judicial precedents to the extent that a court of the importing Party would rely on such materials," which, of course, include Federal Circuit precedent. NAFTA, Art. 1904(2), 32 I.L.M. at 683. Thus, petitioners' argument that the Court should grant review because the court of appeals' decision "conflicts with a Binational Panel decision rendered less than a month after the Federal Circuit denied rehearing," Pet. 15, is akin to

urging certiorari based upon a purported "conflict" between a Second Circuit opinion and a later decision of the United States District Court for the Southern District of New York. Such an assertion, if true, means only that the lower tribunal has failed to follow binding precedent.

In any event, the binational panel in *Softwood Lumber* disavowed any conflict with the Federal Circuit's decision in this case. According to the panel, its "holdings are consistent with the determination of the Court of Appeals for the Federal Circuit in *Timken* and *Corus Staal*." Pet. App. 101a. The panel reasoned that the court of appeals' decision in this case did not control the outcome in *Softwood Lumber* because the Federal Circuit had relied upon "the preclusive effect it found in various features of the URAA, most particularly * * * 19 U.S.C. § 3533; § 3538," which establish "specific statutory procedures for determining whether the United States will implement WTO DSB decisions." Pet. App. 104a. While recognizing the importance of the WTO process and the statutory process for ensuring consultation within the political branches regarding whether and how to implement any WTO report, see Pet. App. 104a-109a, the binational panel reasoned that the question presented before it was different because "[i]n *Softwood Lumber*, the Section [3533]/Section [3538] process has run its course," and USTR had directed the Department of Commerce to issue a determination not inconsistent with the WTO report concerning *Softwood Lumber*. Pet. App. 109a. Plainly, then, by its own terms, the binational panel did not purport to make any determination about the interaction of *Chevron* deference and the *Charming Betsy* canon with respect to facts such as those presented in this case, in which the international

dispute resolution mechanism and statutorily dictated process for deciding whether and how to implement the WTO outcome, if necessary, has yet to take place.[9]

4. Finally, contrary to petitioners' assertion, the decision below does not conflict with the decision of any other court of appeals regarding the question whether the *Charming Betsy* canon should be applied to invalidate an agency action that would otherwise be entitled to *Chevron* deference. Indeed, petitioners cite no case in which a court of appeals has struck down an otherwise reasonable agency interpretation of an ambiguous statute on *Charming Betsy* grounds.

Petitioners claim that the court of appeals' opinion below conflicts with the D.C. Circuit's decision in *George E. Warren Corp.* v. *United States EPA*, 159 F.3d 616 (1998), amended on other grounds, 164 F.3d 676 (1999). But that case, which *upheld* an agency's discretion to take a WTO report into account in construing the relevant statute, presents no conflict with the court of appeals' ruling in this case. In *Warren*, the WTO issued an adverse opinion with respect to an Environmental Protection Agency (EPA) rule. 159 F.3d at 619. Pursuant to 19 U.S.C. 3533, the USTR "advised the WTO that the United States intended to comply" with the decision. 159 F.3d at 619. The EPA then promulgated a new rule intended to correct the WTO inconsistency. *Id.* at 619-

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[9] In any event, the binational panel's decision in *Softwood Lumber* is not final and, contrary to petitioners' characterization, does not categorically hold that "zeroing was unlawful under U.S. law." Pet. 16. The Department of Commerce has filed another remand determination in that case, which continues to employ "zeroing," although it does so on a transaction-by-transaction basis, in lieu of the more aggregated product-by-product basis employed in the Department's previous determination.

620. The plaintiffs in *Warren* challenged the EPA's consideration of the WTO report in promulgating its new rule. The D.C. Circuit held that nothing in the text or structure of the statute indicated that "Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the * * * treaty obligations of the United States." *Id.* at 623. The D.C. Circuit's opinion, which *permits* an agency to consider a WTO report when the Executive Branch determines that compliance is appropriate, provides no authority for petitioners' claim that an agency is *required* to amend its practices to conform to a WTO report with which the Executive Branch disagrees.

The decision below is entirely consistent with *Warren*. Petitioners contend otherwise (Pet. 24), asserting that the effect of the court of appeals' decision was to deprive the Department of Commerce "of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations," but the court of appeals held no such thing. To the contrary, in *Timken*, the Federal Circuit specifically concluded that "the statute does not directly speak to the issue of negative-value dumping margins." *Timken*, 354 F.3d at 1342. Plainly, then, the court of appeals did not hold that the statute precludes the Department of Commerce from revising its interpretation of the statute in a manner consistent with WTO rulings.[10]

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[10] Petitioners cite to the court of appeals' discussion of petitioners' argument concerning the "fair comparison" requirement of 19 U.S.C. 1677b(a). See Pet. 24 (citing Pet. App. 7a-8a). Although the court of appeals correctly concluded that the "fair comparison" provision is irrelevant to this issue, because Congress provided an "exhaustive list" of the adjustments necessary to make a "fair comparison" between export price and normal value, see Pet. App. 7a; *Timken*, 354 F.3d at

Finally, petitioners cite *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), as an example of a recent case in which the "interplay between the *Charming Betsy* rule and *Chevron* analysis has already arisen." Pet. 26. Before it even reached the *Charming Betsy* question, however, the Ninth Circuit held that the agency was "not entitled to deference" because its "position is inconsistent with existing [agency] policy and regulations." 346 F.3d at 885. Plainly, then, *Ali* does not support petitioners' argument that an agency's long-standing and otherwise reasonable construction of an ambiguous statute can be invalidated on the basis of the *Charming Betsy* interpretive rule. In any event, this Court overruled *Ali* in *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 125 S.Ct. 694 (2005). The Ninth Circuit thereafter vacated the opinion relied upon by petitioners. 421 F.3d 795, 797 (2005). A vacated opinion, of course, has no precedential effect. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979). Petitioners' claim of a conflict is thus without merit.[11]

1344, that conclusion does not detract from the court of appeals' explicit holding that the statutory definition of "dumping margin" in 19 U.S.C. 1677(35)(A) is ambiguous. *Timken*, 354 F.3d at 1341-1342. Nothing in the Federal Circuit's rationale would prevent the Department of Commerce from taking WTO rulings that construe the Uruguay Round Antidumping Agreement into account in interpreting Section 1677(35)(A).

[11] The other court of appeals decision on which petitioners rely, *Mississippi Poultry Ass'n* v. *Madigan*, 992 F.2d 1359 (5th Cir. 1993), has also been vacated by a grant of rehearing en banc, 9 F.3d 1116 (1993), and replaced by an en banc decision of the Fifth Circuit that makes no reference to the *Charming Betsy* canon of construction, 31 F.3d 293 (1994). See Fifth Circuit Rule 41.3 ("[u]nless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-364

IN THE

Supreme Court of the United States

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF OF PETITIONERS

This case raises issues of fundamental importance to the U.S. economy and its foreign trade relations. Continued use of "zeroing" will cost U.S. businesses and consumers billions of dollars. Pet. at 25. The practice also threatens the nation's status as a trusted treaty partner, by creating disparate understandings of a multi-lateral agreement and risking trans-Atlantic tensions. See Brief of the European Commission as *Amicus Curiae* ("EC Br."). These profound implications of the decision below alone justify review by this Court. Respondents' arguments—most of which flatly mischaracterize petitioners' claims—do not demonstrate otherwise.

Petitioners do not seek to change U.S. law, to give binding effect to decisions of the World Trade Organization ("WTO") or to implement any WTO report. Petitioners argue only that the interpretation of the statutory term "dumping margin" by the Department of Commerce (the "Department") is invalid under U.S. law. Section 3512(c) does not preclude judicial review of this claim, which is why the government waived this argument below. The implementation process of Section 3538(b) likewise does not bar courts from using traditional tools of statutory construction (including the *Charming Betsy* canon) to avoid violations of international agreements that Congress never meant to authorize. Indeed, because it fosters unnecessary frictions with major allies and trading partners, the lower court's dismissive and poorly-reasoned reading of Section 3538(b) is an independent reason for *granting* review, see Pet. at i (third question presented), not a basis for leaving the Agreement-violating practice of zeroing undisturbed.

Nor can respondents defend that practice. The *Charming Betsy* canon plainly applies and renders the Department's statutory interpretation invalid. And a critical distinction the government relied on when it successfully opposed the petition seeking review of *Timken Co.* v. *United States*, 354 F.3d 1334 (Fed. Cir. 2004), no longer applies. The invalidity

of zeroing under U.S. law is itself sufficient to warrant review. And, contrary to respondents' claims, the Binational Panel decision in *Softwood Lumber*[1] creates the functional equivalent of a circuit split. The petition should be granted.

1.a. In their efforts to forestall review, respondents repeatedly mischaracterize the issue in this case. Petitioners have never argued that WTO reports construing the Antidumping Agreement ("AD Agreement") are "binding" on U.S. agencies and courts, "change" the meaning of the Tariff Act, or "prevail" over federal law. See US Steel Opp. at 18; U.S. Opp. at 17. Nor have they argued that those reports *alone* rendered the Department's interpretation of "dumping margin" unreasonable. See U.S. Opp. at 14-15.

Petitioners argue instead that a Department interpretation of a concededly ambiguous statute is unreasonable *as a matter of U.S. law*, because it is inconsistent with *Congress's intent* that the Tariff Act be construed, whenever possible, to comply with the Uruguay Round Agreements. Congress is presumed to intend such compliance under the rule that "an act of Congress ought never be construed to violate the law of nations, if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Here, this presumption is confirmed by Congress's express statements that it enacted the Uruguay Round Agreements Act ("URAA") "to bring U.S. law fully into compliance with . . . those agreements," and expected "implementation of federal statutes consistently with [those] agreements, where permissible under the terms of such statutes." See Statement of Administrative Action ("SAA") at 669-70, Pet. App. 154a-55a.

Petitioners thus bring a standard challenge, under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), to an agency

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[1] Article 1904 Binational Panel Report, *Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Determination*, Secretariat File No. USA-CDA-2002-1904-02 (June 9, 2005).

interpretation of an ambiguous statute. Although Congress has not spoken to the precise issue (zeroing), its presumed, as well as expressly stated, intent (compliance with the Uruguay Round Agreements) renders an otherwise permissible agency interpretation unreasonable. Petitioners rely on WTO reports only as evidence that the Department has violated Congress's intent by resolving a statutory ambiguity in a manner that does not comply with the requirements of the AD Agreement.

b. Section 3512(c) does not bar review of this claim. U.S. Opp. at 14. The Federal Circuit rejected this very argument in *Timken*, 354 F.3d at 1341, as did the Court of International Trade ("CIT") below, Pet. App. 25a n.13, and the government waived it on appeal. Brief for Department of Commerce at 31 n.5, *Corus Staal BV* v. *Department of Commerce* (No. 04-1107). In any event, the argument is baseless. Petitioners do not seek to invalidate zeroing because "it is inconsistent with [the AD Agreement]," 19 U.S.C. § 3512(c)(1)(B), but because it is inconsistent with *Congress's intent* that the Tariff Act be enforced consistently with that Agreement. Section 3512(c) plainly does not divest courts of authority to use ordinary U.S. legal rules to determine the validity of agency interpretations of statutes. See *Uzbekistan* v. *United States*, 25 C.I.T. 1084, 1088 (2001) (under Section 3512, parties "are free to argue that Congress would never have intended to violate an agreement it generally intended to implement").

In fact, the U.S. told the WTO that Section 3538(c)(1) of the URAA "does not limit judicial review" of anti-dumping proceedings, and that U.S. courts can use *Charming Betsy* to ensure compliance with the Uruguay Round Agreements.[2] It would have been disingenuous for the government to assure the WTO that Section 3538 permits judicial review if, as it now claims, another provision precluded that very review.

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[2] *United States – Section 129(c)(1) of the Uruguay Round Agreements Act, Second Written Submission of the United States*, WT/DS221, ¶¶ 12, 20 (Mar. 8, 2002) (emphases added) (attached hereto as Reply App. 2a, 6a-7a).

c. Nor do petitioners seek to "usurp the role of the political branches to decide whether and how to implement WTO decisions." US Steel Opp. at 21; see also US Opp. at 15. Petitioners have never sought to implement a WTO report. No WTO report addressed the use of zeroing with respect to petitioners' products until *after* petitioners sought this Court's review. See *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005). Nor did petitioners seek to implement the decision in *EC – Bed Linen*,[3] which involved zeroing by the European Commission, or *Softwood Lumber*,[4] which involved Canadian lumber. Rather, petitioners cited these decisions only to show what the AD Agreement means, and thus that the Department's construction of the Tariff Act conflicts with Congress's desire to ensure full compliance with that Agreement.

Once the red herring of implementation is swept aside, the deeply flawed nature of respondents' argument—and of the lower court's ruling—is evident. Congress enacted the URAA to ensure full compliance with the Uruguay Round Agreements, and expected agencies to exercise their discretion to comply with those Agreements whenever possible. SAA 669-70, 676, Pet. App. 154a-155a. Yet, according to respondents and the lower court, when the WTO finds that the Department's discretionary action violates those Agreements, the URAA bars courts from even considering whether that action unreasonably deviates from congressional intent.[5]

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[3] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted Mar. 1, 2001).

[4] *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004).

[5] Contrary to the government's claim, U.S. Opp. at 17-18, the lower court plainly foreclosed judicial review of this claim. Citing Section 3538, it refused to consider petitioner's *Charming Betsy* argument on the ground that doing so would invade "the *exclusive province* of the political branches." Pet. App. 10a (emphasis added). This is not merely a refusal

Section 3538(b) does not mandate this absurd result. It says nothing at all about judicial review of agency action, let alone evinces a clear intent to foreclose such review. See Pet. at 27-28. To the contrary, Congress contemplated that a change in law necessary to comply with an adverse WTO ruling could be effectuated through "judicial action." SAA at 1033, Pet. App. 157a. In fact, the U.S. has advised the WTO that implementation decisions under Section 3538 "*do[] not limit judicial review*" of antidumping proceedings, and that such decisions do not preclude the Department from "'chang[ing] its interpretation of U.S. law . . . *as a result of a direction from a U.S. court.*'" Reply App. 7a & n.16 (emphasis added).

Thus, it cannot "thwart Congress' entire statutory scheme," US Steel Opp. at 21, for courts to look to WTO reports when they apply ordinary tools of statutory construction to determine the validity of an agency interpretation of ambiguous law. Tellingly, respondents nowhere explain why, in a statute designed to ensure full U.S. compliance with the AD Agreement, Congress disabled courts from using such tools to avoid unintended violations of that Agreement and the international frictions such violations cause. By contrast, permitting courts to rely on WTO reports when employing the *Charming Betsy* canon does not rob Section 3538(b) of its purpose or "strip" the political branches of powers conferred by that provision. U.S. Opp. at 17. The political branches must still address *unavoidable* conflicts (*e.g.*, where Congress *requires* action deemed violative of the Agreements) and in those cases will decide whether and if so how to implement a WTO ruling.

In short, the lower court plainly erred in ruling that Section 3538(b) precludes review of petitioners' *Chevron/Charming Betsy* claim. Nothing in the language or history of that provision overrides the strong presumption in favor of judicial review of agency interpretations of ambiguous statutes—a

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to give WTO decisions "determinative weight," U.S. Opp. at 18, but a ruling that the judiciary lacks authority to hear this legal challenge.

presumption that applies with particular force where, as here, foreclosing review will create international tensions and require the political branches to address international violations Congress never intended to authorize. A contrary reading avoids these anomalies, gives independent meaning to Section 3538(b), and ensures that U.S. trade laws are enforced in accordance with the will of Congress, which speaks on behalf of the U.S. in such matters. Pet. at 28-30.

Indeed, even if the lower court's construction were less clearly wrong, the very question of the proper scope of Section 3538(b) is a profoundly important one that warrants this Court's review. In its terse treatment of the issue, the lower court did not mention the presumption of judicial review, dismissed the international tensions its interpretation will cause as none of its concern, and nowhere addressed the obvious anomalies of that interpretation. Pet. App. 9a-10a. This dismissive and poorly-reasoned "analysis" should not be the judiciary's final word on such an important issue. The European Commission has taken the extraordinary step of urging this Court to address the validity of zeroing under domestic law. If this request is to be rebuffed, it should only be because this Court concludes, after plenary review, that Section 3538 bars courts from ensuring that ambiguous statutes are construed, where possible, consistently with U.S. international obligations.

2. Respondents' defense of zeroing itself fares no better. The government half-heartedly argues that the *Charming Betsy* canon operates only to avoid interference with the prescriptive, or regulatory, authority of other sovereigns and thus has no bearing on the proper interpretation of the ambiguous phrase "dumping margin." U.S. Opp. at 12-13. But in *Weinberger* v. *Rossi*, 456 U.S. 25 (1982), this Court applied the canon to a statute that barred the U.S. military from discriminating against U.S. citizens on U.S. bases abroad. The Court construed this statute narrowly not because a foreign government was regulating the same hiring

practices, but because, as here, a contrary interpretation would violate U.S. obligations under an executive agreement. *Id.* at 31-32. Moreover, in flat contradiction of its claims here, the U.S. told the WTO that the *Charming Betsy* canon ensures that *domestic trade law* is interpreted consistently with the Uruguay Round Agreements where possible. Reply App. 2a.

The canon is not rendered inapplicable because the interpretation at issue is longstanding. *E.g.*, U.S. Opp. at 3, 15 n.7. Agencies can change interpretations of ambiguous statutes, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996), and evidence that an existing interpretation conflicts with an authoritative interpretation of a subsequent executive agreement would provide a basis for doing so. Respondents cite no authority suggesting that the *Charming Betsy* canon does not or should not apply in such circumstances.[6]

Finally, the fact that this Court declined review in *Timken*, U.S. Opp. at 18, is irrelevant. In opposing review in that case, the government argued that the WTO reports Koyo cited were "not . . . an adequate basis for overturning" the Department's interpretation because those reports "*addressed a different type of administrative proceeding* [*i.e.*, an "administrative review" rather than an "investigation"] *governed by a different provision of the Anti-Dumping Agreement.*" Brief for the United States in Opposition at 13, *Koyo Seiko Co., Ltd.* v. *United States*, No. 04-87 (U.S. Sept. 2004) ("*Koyo* Opp.") (emphases added).[7] This case involves an investigation, the

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[6] Nor is zeroing needed to prevent "masked" dumping. *See* U.S. Opp. at 15 n.7; US Steel Op. at 4. Another provision of the Tariff Act expressly addresses this very concern. *See* 19 U.S.C. § 1677f-1(d)(1)(B).

[7] *See also Koyo* Opp., at 14 (WTO reports Koyo cited were "not sufficiently on point to provide a basis for overruling" Department's interpretation); id. at 15 (WTO has noted the "possibility that . . . 'zeroing' may be permissible in the context of an administrative review"); *id.* at 16 ("the WTO has not yet addressed the practice of 'zeroing' in administrative reviews").

very type of proceeding at issue in the WTO reports on which petitioners rely. Moreover, *Timken* did not address the URAA's implementation procedures, see 354 F.3d at 1345, and thus did not present the question whether Section 3538 precludes judicial review of a *Charming Betsy/Chevron* claim.

3.a. Ultimately, respondents ask this Court to ignore the Agreement violation caused by the Department's interpretation because there is no split among the circuits. But this Court often reviews Federal Circuit decisions where, as here, that court's jurisdiction is exclusive and the issue is important.[8] And the validity of zeroing under U.S. law is a vitally important issue.

The practice not only has an enormous impact on the U.S. economy, Pet. at 25, it "pose[s] a threat to relations between the United States and other countries." EC Br. at 2. Four separate WTO reports (three involving the U.S.) have held that zeroing violates the AD Agreement, yet the Department adheres to the practice and the Federal Circuit refuses even to consider whether Congress intended to authorize this violation. By contrast, European courts have used their version of the *Charming Betsy* canon to avoid WTO violations when interpreting laws that, like U.S. law, bar private enforcement of the Agreements and accord deference to agencies implementing them. *Id.* at 18-19. Thus, the U.S. violation of the AD Agreement results from inconsistent *judicial* decision-making under parallel legal regimes. It is therefore essential that this Court grant the petition and ensure that U.S. courts discharge their traditional duty of harmonizing ambiguous statutes with international law so the U.S. can "have a role as a trusted partner in multilateral endeavors." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

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[8] *See, e.g.*, *Merck KGaA* v. *Integra Lifesciences I, Ltd.*, 125 S. Ct. 2372 (2005); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003).